(9)

No. 88-1775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GARY E. PEEL,
Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN URGING REVERSAL

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September 1, 1989

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MOTION BY PUBLIC CITIZEN FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* URGING REVERSAL

Pursuant to Rule 36.3 of the Rules of this Court, Public Citizen, a nation-wide consumer advocacy organization with over 50,000 members, moves for leave to file the annexed brief as an *amicus curiae* urging reversal.

Public Citizen seeks leave to file this brief because its members, like most Americans who on occasion need legal assistance, have a direct stake in the outcome of this case. This Court's decision will determine whether an attorney has a First Amendment right to inform the public of his or her area of specialization and to state that the attorney has been certified as a specialist by a nationally-recognized professional association. In light of the increasing specialization among attorneys, and a corresponding need on the part of individuals for a broad array of legal services, Public Citizen's members have a strong interest in being able to identify those members of the bar who possess the skills and qualifications necessary to best handle their particular legal problems. Unless the ruling below is overturned, the

Illinois rule at issue in this case will continue to deny consumers access to truthful information that could be highly important in making the often critical choice of which attorney to employ. Accordingly, Public Citizen seeks leave to file this brief to highlight to the Court a perspective that might not otherwise be presented by the parties, namely, that of consumers of legal services.[1]

Counsel for petitioner Gary E. Peel consented to the filing of this brief. However, counsel for respondent Attorney Registration and Disciplinary Commission of Illinois declined to consent, while indicating that respondent would not file an opposition.

Respectfully submitted,

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Attorneys for Public Citizen

September 1, 1989

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[1]Public Citizen, through its attorneys at the Public Citizen Litigation Group, has frequently participated in this Court's lawyer advertising cases. Thus, its attorneys represented the appellant in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and filed *amicus* briefs in *Bates v. State Bar of Arizona*, 433 U.S. 733 (1977), *In re Primus*, 436 U.S. 412 (1978), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). They also represented the appellee in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and filed an *amicus* brief in *Bigelow v. Virginia*, 421 U.S. 809 (1975).

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BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN URGING REVERSAL

INTERESTS OF *AMICUS*

This brief is filed on behalf of Public Citizen, a nation-wide consumer advocacy organization that has over 50,000 members. Public Citizen's members, like most Americans, occasionally need legal assistance. For that reason, they have a direct stake in the outcome of this case, which will determine whether an attorney has a First Amendment right to inform the public of his or her area of specialization and to state that the attorney has been certified as a specialist by a nationally-recognized professional association. In an age of increasing specialization among attorneys, and a corresponding need on the part of individuals for a broad array of legal services, consumers have a strong interest in being able to identify those members of the bar who possess the skills and qualifications necessary to best handle their legal problems. However, the Illinois rule at issue in this case denies consumers access to truthful information that could be highly important in making the determination of which attorney to

employ. Public Citizen has long supported the free flow of information about the cost, nature, and availability of specific legal services because this information significantly benefits consumers and serves the interests protected by the First Amendment. Accordingly, Public Citizen is filing this brief to highlight a perspective that might not otherwise be presented by the parties, namely, that of consumers of legal services.[2]

STATEMENT

The facts giving rise to this proceeding are simple and uncontested. Petitioner Gary E. Peel has been licensed to practice law for over twenty years, and he is admitted to the bars of Illinois, Missouri and Arizona. Pet. App. at 28a. Mr. Peel is a highly experienced trial lawyer, having tried several hundred cases to verdict, and having handled over one thousand cases. Pet. App. at 29a-30a. In 1981, Mr. Peel was certified as a "civil trial specialist" by the National Board of Trial Advocacy ("NBTA"), and he has maintained his certification since then. Pet. App. at 29a.[3] There is no dispute that the NBTA is a

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[2]Public Citizen, through its attorneys at the Public Citizen Litigation Group, has frequently participated in this Court's lawyer advertising cases. Thus, its attorneys represented the appellant in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and filed *amicus* briefs in *Bates v. State Bar of Arizona*, 433 U.S. 733 (1977), *In re Primus*, 436 U.S. 412 (1978), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). They also represented the appellee in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and filed an *amicus* brief in *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[3]NBTA is sponsored by the American Trial Lawyers Association, the International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, the American Board of Professional Liability Attorneys, and the National District Attorneys' Association.

nationally-recognized, professional organization founded by a number of bar groups to enhance the quality of legal services to the public. Certification of lawyers possessing substantial and objectively verifiable trial skills is one part of the work of NBTA. Nor is there any dispute that, in order to obtain certification by the NBTA, an attorney must satisfy a number of stringent requirements (described in petitioner's brief, and in *In re Johnson*, 341 N.W.2d 282, 283 (Minn. 1983)), demonstrating his or her experience, proficiency and specialization in trial advocacy. There is also no dispute that petitioner amply satisfied those standards.

The catalyst for this litigation was Mr. Peel's decision in 1983 to place on his letterhead the following statement: "Certified Civil Trial Specialist By The National Board of Trial Advocacy." Apart from Mr. Peel's listing in Martindale-Hubbell, which also notes his certification by NBTA, and his letterhead, Mr. Peel has made no effort to publicize his certification. Pet. App. at 31a. For three years, Mr. Peel used this letterhead in his practice, sending letters to, among others, clients, lawyers and courts. During this period, no complaints were lodged against Mr. Peel by any member of the public, by other lawyers, or by anyone else.

However, in April 1986, in the course of Mr. Peel's representation of two other attorneys before the respondent Attorney Registration and Disciplinary Commission of Illinois ("ARDC"), the Administrator of ARDC noticed the statement on Mr. Peel's letterhead. Acting on his own initiative, the Administrator filed a complaint against Mr. Peel, alleging principally that Mr. Peel's letterhead violated Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility, which provides, with exceptions not relevant here, that "no lawyer may hold himself out as 'certified' or a 'specialist.'"

During the administrative hearing on the complaint, the Administrator of ARDC articulated his theory about why Mr.

Peel's letterhead statement violated Rule 2-105(a)(3) and thus could properly be banned. Recognizing (i) that Mr. Peel's letterhead is indisputably truthful, (ii) that there is no evidence whatsoever that any member of the public or the profession has been misled by it, (iii) that the NBTA is an established professional organization, and (iv) that the information relating to certification by the NBTA would be useful to the public, the Administrator argued that *any* statement regarding specialization or certification is "inherently misleading" and hence can be suppressed consistent with the First Amendment. Even though no evidence was introduced to support his theory, the Administrator took the position that a sweeping, categorical ban on all public statements concerning certification programs is essential as a prophylactic measure, since that is the only way the state can prevent "bogus" groups from conferring undeserved or meaningless certifications. Pet. App. at 37a.

The Hearing Board accepted a variation of this theory. It asserted that, since Illinois had "never recognized or approved any certification process[,]" Mr. Peel's use of the letterhead statement was inherently misleading because it falsely implied that his certification by NBTA was approved or sponsored by the Illinois Supreme Court. Pet. App. at 20a. However, the Board pointed to nothing in the record to support its assumption that a reader of Mr. Peel's letterhead would be misled into believing that the state had somehow approved NBTA's certification process. The Hearing Board recommended that Mr. Peel be publicly censured, and the ARDC's Review Board concurred. Pet. App. at 16a.

The Illinois Supreme Court affirmed. In its opinion, the court found that Mr. Peel had violated Rule 2-105(a)(3) in two respects. To start with, the court held that "the claim of certification by the NBTA impinges upon the sole authority of this court to license attorneys in this State and is misleading because of the similarity between the words 'licensed' and 'certified.'" Pet.

App. at 9a. Thus, the court thought it "apparent . . . that the general public could be misled to believe that the respondent may practice in the field of trial advocacy solely because of his certification by the NBTA." Pet. App. at 9a.[4]

The court also asserted that the statement was misleading because "it tacitly attests to the qualifications of respondent as a civil practice advocate." Pet. App. at 9a. According to the court, the certification statement is "tantamount to a claim of superiority by those attorneys who are certified." Pet. App. at 9a. In so concluding, the court recognized the need to explain the distinction embodied in Illinois Rule 2-105(a)(3) between statements that an attorney "concentrates in" or "limits" his practice to a particular field on the one hand, which are lawful, and statements that the lawyer is a "specialist," or "specializes in" a given area on the other, which are forbidden. In the court's view, the former statements simply convey information regarding the lawyer's area of practice; they pose little threat of misleading the public. But the court found that statements indicating a specialty "have acquired a secondary meaning implying formal recognition as a specialist and use of these terms is misleading, except in States which provide procedures for such certification." Pet. App. at 13a. Because Illinois had not established procedures for certifying specialists, the court held that any statement by Mr. Peel that he had been certified as a trial specialist was misleading and barred by Rule 2-105(a). Accordingly, the court upheld the public censure of Mr. Peel.

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[4]Although the court acknowledged that Mr. Peel's letterhead also contained the separate, equally prominent statement "Licensed: Illinois, Missouri, and Arizona," the court discounted Mr. Peel's effort to draw precisely the line that the court believed important by stating that "[t]he letterhead contains no indication that the licensure was by official organizations that had authority to license, whereas the certification was by an unofficial group and was purely a voluntary matter." Pet. App. at 9a.

ARGUMENT

ILLINOIS' RULE, AS APPLIED TO PROHIBIT A TRUTHFUL, OBJECTIVELY VERIFIABLE STATEMENT REGARDING CERTIFICATION AS A SPECIALIST BY A *BONA FIDE* ORGANIZATION, VIOLATES THE FIRST AMENDMENT.

1. *The Court's Lawyer Advertising Decisions Establish A Broad Right To Disseminate Truthful Information.*

In the twelve years since *Bates v. State Bar of Arizona*, 433 U.S. 733 (1977), this Court has on several occasions attempted to chart the permissible boundaries of state restrictions on communications between attorneys and potential clients. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). Despite their divergent facts, these cases all recognize two related concerns that arise whenever a state restricts the dissemination of information about the availability and cost of legal services: (1) that legal rights often go unvindicated out of ignorance of those rights; and (2) that consumers lack vital information about how to obtain the legal services they need at a price that they can afford. Thus, *Bates*, *Primus*, *R.M.J.*, *Zauderer*, and *Shapero* are all based on the understanding that advertising and other communications between lawyers and potential clients can be instrumental in apprising people of their legal rights.[5]

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[5]Like Mr. Peel, we are far from convinced that his letterhead statement constitutes "commercial speech," since it in no way "propose[s] a commercial transaction," which "is the test for identifying commercial speech." *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3031 (1989), *quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *see also Riley v. National Federation of the Blind of North Carolina, Inc.*, 108 S. Ct. 2667 (1988). To the contrary, the record in this case establishes that Mr. Peel did not use his letterhead in any effort to attract new clients. Pet. App. at 31a. While there remain unresolved questions as to the "precise bounds of the category of expression that may be termed commercial speech," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), the expression at issue here is quite different from the communications at issue in the Court's prior commercial speech cases, which have all involved direct efforts to secure new business. However, in our view, it is not necessary for the Court to resolve the question of how to characterize Mr. Peel's statement because, even applying the less stringent protections offered by the commercial speech doctrine, Mr. Peel's letterhead is plainly protected. Accordingly, we urge the Court to rule that, even if Mr. Peel had advertised his certification — for example, in a newspaper ad seeking employment — Illinois could not forbid him from doing so consistent with the First Amendment.

These cases also address the next step in the process: to what extent may lawyers assist members of the public, through advertising and other communications, in finding a qualified and willing attorney to help them in resolving their particular legal claim. *Bates* teaches that lawyers seeking employment may engage in truthful newspaper advertising of prices for "routine" legal services. *R.M.J.* makes clear that lawyers must be permitted to advertise the areas of law in which they practice, provided that the lawyer's description is not misleading. *Zauderer* affirms the principle that, while states may regulate in-person solicitation by lawyers, non-deceptive advertising designed to attract clients who have specific legal problems is protected by the First Amendment, and it also establishes that a state cannot restrict the use of illustrations in advertising for legal services, unless the state can demonstrate that consumers will be misled. Finally, *Shapero* holds that lawyers can use targeted, direct mail solicitations to reach people thought to need specific legal services. Read together, these cases firmly establish that the First Amendment forbids a state from imposing broad restrictions on attorney

advertising where "less restrictive and more precise means" are available. *Shapero*, 108 S. Ct. at 1923.[6]

2. *Illinois Cannot Bar Truthful, Objectively Verifiable Statements Regarding Specialization or Certification.*

In *amicus'* view, there is no way to reconcile the decision below with the rationale underlying this Court's prior lawyer advertising cases. Mr. Peel seeks to disseminate truthful, objectively verifiable information about his practice and his qualifications. No one denies that it would be relevant to a prospective client looking to retain a skilled trial lawyer that Mr. Peel has been "certified" as a "civil trial specialist" by a nationally recognized organization of his peers.

Nor can it be doubted that the public has a significant interest in learning about an attorney's qualifications. Lawyers are not fungible—they are not equally qualified to handle every type of case. The legal profession now encompasses literally hundreds of specialties and sub-specialties—running the gamut from adoption to zoning. Indeed, these days, to say that a lawyer is a "tax specialist" is too imprecise—the tax system is so complex that there are specialists in corporate, estate, international and individual taxation, no doubt with dozens of sub-specialties within those broad categories. This drive towards lawyer specialization, in turn, reflects the growing intricacies of the present-day legal system. For someone in need of legal representation, it is essential to find an attorney with the right qualifications and skills to provide the best assistance for the particular matter at hand.[7]

[6]While the Court's recent decision in *Board of Trustees v. Fox*, 109 S. Ct. 3028 (1989), suggests that the "least restrictive means" test is no longer required in commercial speech cases, *Fox* alters neither the analysis nor outcome of this case. In *Fox*, the Court made it clear that, in order to justify a restraint on commercial speech, the state still must show that the restraint is "narrowly tailored to achieve the desired objective." *Id.* at 3035. Since, as described more fully below and in petitioner's brief, respondent made no effort at all to tailor its restraint, but instead imposed a categorical ban, the ban cannot survive.

Illinois' disciplinary rule, Rule 2-105(a)(3), recognizes the value of providing the public with information about a lawyer's field of practice. It affirmatively permits a "lawyer or law firm" to "specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice." However, the rule goes on to state that "no lawyer may hold himself out as 'certified' or a 'specialist.'" The justification for Illinois' bright-line distinction, we are told by the ARDC and the Illinois Supreme Court, is that the terms "specialist" and "certified" carry with them a "secondary meaning implying formal recognition as a specialist," as well as an implicit assertion of special

[7]Many firms apparently believe that it is important to inform the public of the areas in which their attorneys practice. In Chicago, for instance, a number of the most prominent firms list in Martindale-Hubbell the area of specialization for each of their attorneys. To illustrate, the Martindale-Hubbell entry for the firm of Hopkins & Sutter shows that its lawyers specialize in: litigation, antitrust, health care, corporate, equipment leasing, saving and loan, fiduciary law, federal taxation, tax-exempt organizations, estate planning, corporate benefits, probate, insurance, acquisitions and venture capital, closely held corporations, municipal finance, and environmental law. Other major firms, including Keck, Mahin & Cate, Kirkland & Ellis, Lord, Bissell & Brook, Sachnoff, Weaver & Rubenstein, and Seyfarth, Shaw, Fairweather & Geraldson, similarly list the fields in which their attorneys concentrate their practices. In addition, most firms routinely list their attorneys' affiliation with major professional organizations. A number of Mayer, Brown & Platt attorneys are listed as "Fellow, American College of Trial Lawyers," as are many lawyers in other firms. While these listings do not purport to *certify* that the lawyer is an expert or specialist in the field of trial practice, it is difficult to imagine why firms would pay to have that information included in their listings unless it is to convey the impression that its attorneys are, in fact, expert trial lawyers.

expertise. Pet. App. at 13a; *see* Respondent's Brief in Opposition to Petition for a Writ of Certiorari, at 31-33. While respondent acknowledges the legitimacy of the NBTA and does not dispute that NBTA's certification is based on reasonable and objective criteria, respondent fears a proliferation of bogus organizations conferring undeserved certifications, which, it asserts, would be difficult to police. Accordingly, respondent claims that the use of the terms "specialist" and "certified" is inherently misleading, and hence the state may impose a categorical ban as a prophylactic measure to prevent the public from being deceived.

The difficulty is that Illinois has done precisely what this Court has repeatedly said states are forbidden from doing — it has imposed an outright ban on a category of speech on the basis of untested, unproven, and fundamentally paternalistic assumptions concerning the ability of the public to understand statements relating to the delivery of legal services. *See Bates*, 433 U.S. at 381; *R.M.J.*, 455 U.S. at 200 n.11; *Zauderer*, 471 U.S. at 644-46. Although Illinois assumes that the public will misunderstand Mr. Peel's letterhead, it is hard to imagine why that is so. Most consumers would read the letterhead as meaning what it says — that a national organization of trial lawyers has "certified" that Mr. Peel is a "specialist" in civil trials. There is simply no room in Mr. Peel's unadorned statement relating to certification to support respondent's concern.

Nor is there any basis for respondent's theory, endorsed by the Illinois Supreme Court, that the public is likely to believe that a certification by the *National* Board of Trial Advocacy is equivalent to a license by an instrumentality of the *Illinois* state government. This is especially so since any conceivable confusion is dispelled by the separate listing on Mr. Peel's letterhead of the states in which he is in fact "licensed" to practice.

Nonetheless, the Illinois Supreme Court found this concern substantial, adopting the argument that the term "specialized" carries with it a "secondary meaning" that the specialist has been

officially approved as such by the state. However, neither the court nor the ARDC pointed to any evidence to support the existence of this secondary meaning, much less its prevalence among lay-people. But it is settled doctrine that a state seeking to uphold a restriction on commercial speech has the burden of justifying it. *Zauderer*, *supra*, 471 U.S. at 647. As the Court emphasized in *Zauderer*, a state cannot base a prophylactic rule on unsupported assertions or unsubstantiated fears; rather it must back up its claim of potential harm with evidence in the record. *Id.* at 644-47; *see also Board of Trustees v. Fox*, *supra*, 109 S. Ct. at 3035. Here, as in *Zauderer*, the "State's arguments amount to little more than unsupported assertions: nowhere does the state cite any evidence or authority of any kind for its contention that the potential abuses [that could flow from statements regarding certification] . . . cannot be combated by any means short of a blanket ban." 471 U.S. at 648-49.

Instead of evidence, the only support cited by the Illinois court is a Draft Report of the American Bar Association Standing Committee on Ethics and Professional Responsibility which simply asserts that the terms "specialist" and "certified" "have acquired a secondary meaning implying formal recognition as a specialist." Pet. App. at 12a-13a. While that may be the tentative view of one ABA Committee, both the United States Department of Justice and the Federal Trade Commission have weighed in on the other side of the debate. In a July 23, 1982 letter signed by Jonathan D. Rose, then Assistant Attorney General in charge of the Office of Legal Policy, the Justice Department addressed an earlier proposal by the ABA Committee that advocated forbidding *all* statements implying that an attorney is certified or a specialist, including statements that the lawyer's practice "is limited to" or "concentrated in" particular fields, because all of these terms have a "secondary meaning." In response, the Justice Department questioned

> whether these terms have acquired any such "secondary meaning" among laymen. On the other hand, this information could be useful to potential clients for legal services. In an effort to exclude subjective claims of expertise, we believe the Rule may unnecessarily preclude valid statements of objective fact. We recommend, therefore, that the rule be limited to prohibiting improper claims of specialization, leaving statements concerning fields of practice to be governed only by the general strictures of proposed Rule 7.1 [prohibiting false, deceptive or misleading statements].

Rose Letter, at 9, Reprinted as Appendix D to Executive Summary, Federal Trade Commission, *Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (Nov. 1984) ("*FTC Staff Report*"). The FTC staff expressed the same view, recommending that lawyers be allowed to identify the areas in which they practice, and stressing that the "*only* limitation is that the lawyer shall not state or imply any officially recognized expertise or certification that he or she does not actually possess." *FTC Staff Report*, Executive Summary at 8 (emphasis added).

The distinction drawn by the FTC and Department of Justice is a sensible one that is in keeping with the Court's prior lawyer advertising rulings. Thus, as the Court has repeatedly held, truthful, objectively verifiable information relating to a lawyer's qualifications, fees, or services is protected by the First Amendment and can be suppressed only on a showing — based on record evidence — that it would be misunderstood by the public. Indeed, in *Zauderer*, the Court made clear that while it had left open the question of whether states "may prevent attorneys from making non-verifiable claims regarding the quality of their services," a state could not "prevent an attorney from making accurate statements of fact regarding the nature of his practice

merely because it is possible that some readers will infer that he has some expertise in those areas." *Zauderer, supra*, 471 U.S. at 640 n.9.

In defending Illinois Rule 2-105(a)(3), the Illinois Supreme Court also suggested that there is a difference of constitutional dimension between statements regarding specialization, which are forbidden because they imply expertise, and statements regarding field of concentration, which are permitted. Pet. App. at 13a. There are several reasons why this distinction cannot bear the weight placed on it by the state.

To begin with, from the public's standpoint, it is hard to see any material difference in a lawyer's claim that he "specializes in" or "concentrates in" or "limits" his practice to a particular field. To the contrary, to "specialize" is "to concentrate one's efforts" or "to limit in scope or interest." *Webster's Third New International Dictionary*, at 2186 (1961). It may be, of course, that the public will assume that if a lawyer specializes or concentrates in a given field, he or she has developed expertise in that subject. But if respondent fears that the public may wrongly assume such expertise, that concern applies with equal force to those statements which are *permitted* by Rule 2-105(a)(3), and hence it cannot justify the line that Illinois has drawn.[8]

More importantly, respondent never directly answers the underlying question posed by its rule — namely, why does the public need to be protected from truthful, objective statements which directly bear on an attorney's specialty or certification? While respondent admits that the public has a need for informa-

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[8]In fact, the same ABA Committee on whose report respondent has relied previously proposed a sweeping ban of *any* statements regarding specialization, including statements that an attorney's practice is "limited to" or "concentrated in" a particular field, because these terms had also acquired "a secondary meaning implying recognition as a specialist." *See* Rose Letter, at 9 (citation omitted). This casts further doubt on the rationale Illinois offers to support its rule.

tion that will help in the selection of an attorney, and that information regarding certification by a *bona fide* organization would be relevant to that choice, it refuses to allow the public to obtain this information because of unsubstantiated fears of theoretical abuses.

What is worse, respondent acknowledges that it is sacrificing Mr. Peel's First Amendment right to convey unquestionably truthful information on the altar of administrative convenience. In essence, respondent contends that this Court should countenance the muzzling of truthful speakers like Mr. Peel because policing abuses in the marketplace would be too onerous. This argument, however, has been repeatedly rejected by this Court. Most recently, in *Shapero*, the Court struck down a Kentucky rule prohibiting lawyers from sending "targeted" direct mailings over the state's claim that it would be too difficult to safeguard against abuses. The Court ruled that the state could regulate improper letters "through far less restrictive and more precise means" than a total ban. 108 S. Ct. at 1923. The Court then expressly rejected the state's argument that it would be too burdensome to police against abuse:

> To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But "[o]ur recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

Id. at 1924, *quoting Zauderer, supra,* 471 U.S. at 646; *see also Bates, supra,* 433 U.S. at 379 (rejecting state's argument that "wholesale restriction" on lawyer advertising is "justified by the

problems of enforcement if any other course is taken").

Illinois may have decided for the moment that it does not want to sponsor a state certification program — and there may be good reason for that decision. But that fact alone cannot permit the state categorically to ban all speech by attorneys relating to certification by *bona fide* organizations. So long as there are more "narrowly tailored" means for the state to protect against abuse, *cf. Board of Trustees v. Fox, supra,* 109 S. Ct. at 3035, it cannot impose an outright ban like that contained in Rule 2-105(a)(3).

Finally, a reversal here would not leave Illinois powerless to protect the public against false claims of certification, or claims of certification by bogus organizations. Illinois Rule 2-101(b) flatly prohibits false, misleading, or deceptive claims in advertising or publicity. In the alternative, Illinois could follow the lead of Alabama and Minnesota, which, after court decisions affirming the First Amendment rights of attorneys to list their certification by NBTA, established programs to license organizations which certify lawyers as specialists. *See Ex Parte Howell,* 487 So. 2d 848 (Ala. 1986); *In re Johnson,* 341 N.W. 2d 282 (Minn. 1983); *see also* Pet. App. at 5a. Or, if Illinois concluded that additional disclosures were needed to cure any perceived defect, it could require that any attorney listing certification must provide additional explanatory material upon request of a client or prospective client. Whatever course Illinois decides to follow, it would clearly have many options open to it if the Court finds Rule 2-105(a)(3)'s outright ban on statements of specialty or certification unconstitutional.

CONCLUSION

For the reasons stated above, the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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